

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	File No.: EB-TCD-12-00001013
Scott Malcolm)	NAL/Acct. No.: 201432170003
DSM Supply, LLC)	FRN: 0023383201
Somaticare, LLC)	
)	

FORFEITURE ORDER

Adopted: February 18, 2016

Released: February 18, 2016

By the Commission: Commissioner O’Rielly concurring in part and dissenting in part.

1. We impose a penalty of \$1,840,000 against Scott Malcolm, DSM Supply, LLC (DSM), and Somaticare, LLC (Somaticare) (collectively, the DSM Parties), for sending 115 unsolicited advertisements to the telephone facsimile machines of 26 consumers. These fax advertisements (commonly known as junk faxes) were directed primarily to health care practitioners, many of whom repeatedly attempted to stop the relentless barrage of unwanted and unsolicited advertisements for chiropractic products from the DSM Parties.¹ The intrusion, expense, and disruption of business activities (including patient care) that resulted from these junk faxes highlight the harms that Congress sought to prevent by prohibiting unsolicited fax advertisements. The Commission has adopted rules to implement this prohibition, and we hold the DSM Parties accountable for their violations of these rules.

2. On February 24, 2014, the Commission issued a Notice of Apparent Liability for Forfeiture (*NAL*) proposing a \$1,840,000 forfeiture against the DSM Parties² for willful and repeated violation of Section 227(b)(1)(C) of the Communications Act of 1934, as amended (Act), and Section 64.1200(a)(4) of the Commission’s rules (Rules) by delivering advertisements to telephone facsimile machines without prior express invitation or permission or without meeting the requirements for advertisements faxed under an established business relationship.³ None of the DSM Parties filed a timely response to the *NAL*. Based on the information before us, we affirm the forfeiture proposed in the *NAL*.

3. The DSM Parties failed to file a timely response to the *NAL* or request an extension of time to respond to the *NAL*. Instead, counsel for the DSM Parties waited until almost seven months after the filing deadline to send any response to the Commission.⁴ We reject the *NAL* Response as untimely. Further, even if we did consider the DSM Parties’ untimely response, we would reject the arguments contained therein for the reasons explained below.

¹ See *Scott Malcolm*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 2476, 2479-80, para 8 (2014) (*NAL*). As explained in the *NAL*, “consumers . . . compellingly documented the disruption, expense, and frustration caused both by receipt of the DSM parties’ unlawful advertisements and by the unpleasant and unsuccessful attempts to permanently stop them.” *Id.* Multiple consumers described receiving numerous junk faxes for extended periods, in one case “for years,” despite repeatedly asking the sender to stop. *Id.*

² *Id.* at 2477–84, paras. 4–19 (providing a more complete discussion of the facts and history of this case). The *NAL* is incorporated herein by reference.

³ See 47 U.S.C. § 227(b)(1)(C); 47 CFR § 64.1200(a)(4).

⁴ See DSM Parties’ Response to Notice of Apparent Liability for Forfeiture (received Oct. 16, 2014) (on file in EB-TCD-12-00001013) (*NAL* Response).

4. The DSM Parties summarily contest certain facts in the *NAL* (e.g., that the fax advertisements were unsolicited and sent without prior express invitation or permission of the recipients) but fail to provide any documentary or other reliable support for their claims or in any way rebut the *NAL*'s findings or description of information provided by complainants under penalty of perjury.⁵ Similarly, although the DSM Parties claim to “have an established business relationship with all of the complainants,”⁶ as noted in the *NAL*, while three confirmed having purchased something from DSM, the faxes sent to them did not include the required opt-out notice and the DSM Parties failed to establish any such relationships with the remaining complainants.⁷

5. Moreover, in seeking to remove Scott Malcolm from this action because he allegedly did not personally transmit the faxes, the *NAL* Response fails to address in any way our detailed finding that the DSM Parties are jointly and severally liable for the unlawful faxing because “there exists such a unity of interest and ownership that no separate personality exists as between Mr. Malcolm and DSM or Somaticare” and that “because the evidence . . . demonstrates that Mr. Malcolm *either* personally sent the unwanted faxes *or* was responsible for their transmission, . . . Mr. Malcolm was sufficiently involved in the operations of the companies that he is a ‘person’ liable for unlawful conduct within the meaning of Section 227.”⁸

6. We further conclude that the DSM Parties’ request for clarification and retroactive waiver of Section 64.1200(a)(4)(iv), included in the *NAL* Response, is without merit and we accordingly deny it. First, the *NAL* does not allege a violation of Section 64.1200(a)(4)(iv) and, thus, even if we were to grant the waiver or clarify the rule, it would have no legal effect on our findings and the forfeiture we impose. Second, although the Commission has recognized that good cause exists to grant individual waivers to some parties who send fax ads with the recipient’s prior express permission where they may have been uncertain about whether the requirement for opt-out notices applied to them, that is not the situation presented in this case.⁹ The 2011 citation issued to the DSM Parties for violations of the Act and Rules cited, among other violations, “insufficient opt-out notices” and informed these parties of the legal requirements relating to such violations.¹⁰ Notwithstanding the Citation’s invitation to the DSM Parties to respond by letter, teleconference, or personal interview, the DSM Parties did not reach out to Bureau staff to discuss why the Bureau had found DSM’s activities in violation of the Act and Rules. Rather, the DSM Parties continued their transmission of prohibited faxes, as outlined in the *NAL*. We accordingly reject their claims of “confusion” as to the requirements of the law and find that the DSM Parties were operating under no uncertainty as to the applicability of the opt-out requirements on fax advertisements during the time period covered by this forfeiture.

⁵ See *NAL*, 29 FCC Rcd at 2478–79, para. 5 (“These consumers have further indicated that they received the DSM advertisements without expressly authorizing such faxes to be sent.”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3812, para. 46 (2006) (“In the event that a complaint is filed, the burden of proof rests with the sender to demonstrate that permission was given.”).

⁶ *NAL* Response at 5.

⁷ *NAL*, 29 FCC Rcd at 2478–79, para. 5.

⁸ *Id.* at 2483–84, paras. 16–19 (emphasis added).

⁹ See *Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, Order, 29 FCC Rcd 13998 (2014) (*Anda Order*).

¹⁰ See Citation from Richard A. Hindman, Chief, Telecommunications Consumers Division, FCC Enforcement Bureau, to Somaticare, Inc. aka DSM Supply, LLC and DSM Supply, LLC aka Somaticare, Inc. (Dec. 20, 2011) (on file in EB-TCD-12-00001013 at 2 and Attachment A, section I(C)).

7. In addition, the NAL Response fails to demonstrate that the DSM faxes at issue here would even qualify for waiver of Section 64.1200(a)(4)(iv) of the Commission's rules. The NAL Response appears to conflate an established business relationship with prior express permission or invitation to send a fax advertisement,¹¹ which is at odds with both the Act and the Rules, which establish these elements as separate provisions that permit fax advertisements to be lawfully sent.¹² Further, with respect to waivers of opt-out notice requirements, the Commission has emphasized that the waivers it granted for fax ads sent with prior express permission "do not extend to a similar requirement to include an opt-out notice on fax ads pursuant to an established business relationship, as there is no confusion regarding the applicability of this requirement to such faxes."¹³ Accordingly, to the extent that the DSM Parties seek to equate an established business relationship with prior express permission to fax, waiver of Section 64.1200(a)(4)(iv) of the Rules is not available even assuming, *arguendo*, that such established business relationships actually existed. Moreover, despite the sworn complaints underlying the *NAL*, the DSM Parties offer only blanket and sometimes inconsistent assertions¹⁴ rather than any actual evidence that would demonstrate *either* prior express permission or an established business relationship with respect to any of the 26 complainants.

8. Finally, with regard to the DSM Parties' request that we clarify the statutory basis for Section 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b), Section 1.2 of the Rules provides that the Commission may issue declaratory rulings "terminating a controversy or removing uncertainty."¹⁵ Since the subsection of the Rules at issue is inapplicable here, there is no controversy, nor is there any uncertainty: the Commission in 2014 concluded that section of the Act is, in fact, the statutory basis for Section 64.1200(a)(4)(iv).¹⁶ We therefore deny this request as well.

9. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended,¹⁷ and Section 1.80 of the Commission's rules,¹⁸ Scott Malcolm, DSM Supply, LLC, and Somaticare, LLC, **ARE JOINTLY AND SEVERALLY LIABLE FOR A MONETARY FORFEITURE** in the amount of one million eight hundred forty thousand dollars (\$1,840,000) for willfully and repeatedly violating Section 227(b)(1)(C) of the Act¹⁹ and Sections 64.1200(a)(4) of the Rules.²⁰

10. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within thirty (30) calendar days after the release date of this Forfeiture Order.²¹ If the forfeiture is

¹¹ See, e.g., NAL Response at 5. ("The DSM Parties did not send the complainants an unsolicited fax. The DSM Parties have an established business relationship with all of the complainants.")

¹² See 47 U.S.C. § 227(a)(5), (b)(1)(C)(i); 47 CFR § 64.1200(a)(4)(i), (f)(15).

¹³ See *Anda Order*, 29 FCC Rcd at 13998, 14011, para. 2 n.2, para. 27 n.99; see also 47 U.S.C. § 227(b)(1)(C)(i)-(iii) (establishing a valid opt-out notice as a prerequisite for permissible fax advertising pursuant to an established business relationship).

¹⁴ "The DSM Parties have an established business relationship with *all* of the complainants. . . . cursory review shows that the DSM Parties had established business relationships with *most if not all* of the complainants in this matter." NAL Response at 5 (emphasis added).

¹⁵ 47 CFR § 1.2.

¹⁶ See *Anda Order*, 29 FCC Rcd at 14005, para. 14 ("[W]e conclude that section 227(b) of the Act . . . is the statutory basis for that rule.")

¹⁷ 47 U.S.C. § 503(b).

¹⁸ 47 CFR § 1.80.

¹⁹ 47 U.S.C. § 227(b)(1)(C).

²⁰ 47 CFR § 64.1200(a)(4).

²¹ 47 CFR § 1.80.

not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Act.²²

11. Payment of the forfeiture must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. Scott Malcolm, DSM Supply, LLC, and/or Somaticare, LLC shall send electronic notification of payment to Johnny Drake at Johnny.Drake@fcc.gov on the date said payment is made. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.²³ When completing the Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters “FORF” in block number 24A (payment type code). Below are additional instructions that should be followed based on the form of payment selected:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

12. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer – Financial Operations, Federal Communications Commission, 445 12th Street, SW, Room 1-A625, Washington, DC 20554.²⁴ Questions regarding payment procedures should be directed to the Financial Operations Group Help Desk by telephone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

13. **IT IS FURTHER ORDERED**, pursuant to Sections 1–4 and 227 of the Communications Act of 1934, as amended,²⁵ and Sections 1.2 and 64.1200 of the Commission’s rules,²⁶ that the request for clarification and retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s rules²⁷ filed by Scott Malcolm, DSM Supply, LLC, and Somaticare, LLC, **IS DENIED** to the extent discussed herein.

14. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by first class mail and certified mail, return receipt requested, to DSM Supply, LLC, Attn: Scott Malcolm, President/Owner, 11837 Judd Court, Suite 106E, Dallas, TX 75243; Somaticare, LLC, Attn: Scott

²² 47 U.S.C. § 504(a).

²³ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

²⁴ See 47 CFR § 1.1914.

²⁵ 47 U.S.C. §§ 151–153, 227.

²⁶ 47 CFR §§ 1.2, 64.1200.

²⁷ 47 CFR § 64.1200(a)(4)(iv).

Malcolm, President/Owner, 11837 Judd Court, Suite 106E, Dallas, TX 75243; Scott Malcolm, 11837 Judd Court, Suite 106E, Dallas, TX 75243; and to Michael R. Cramer, Esq., The Willis Law Group, PLLC, 10440 N. Central Expressway, Suite 520, Dallas, TX 75231.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary